UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BENNIE R. ABERCROMBIE, on behalf of himself and others similarly situated,	)	Civil Action No.: 5:15-cv-2214
	)	Judge Elizabeth E. Foote
Plaintiff,	)	Magistrate Judge Karen L Hayes
v.	)	
ROGERS, CARTER & PAYNE, LLC,	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN RESPONSE TO COURT'S ORDER DATED JUNE 3, 2016

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Introduction

On June 3, 2016, this Court directed Bennie R. Abercrombie to "clarify the nature and extent of his concrete and particularized injury" and to "file a brief addressing the effect of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) on existing case law, if any, and whether the definition of the proposed class needs to be modified in conformity therewith." Dkt. No. 35 at 2-3. In short, *Spokeo* does not impact this Court's continuing jurisdiction over this matter as Mr. Abercrombie maintains Article III standing to bring his claim under the Fair Debt Collection Practices Act ("FDCPA"). Moreover, as the putative class is defined in such a way that each member has standing, it does not need to be modified.

Argument

I. Mr. Abercrombie has Article III standing.

A. *Spokeo* did not substantively change the injury in fact requirement for Article III standing.

At issue in *Spokeo* was whether the plaintiff possessed Article III standing to bring claims under the Fair Credit Reporting Act. *Id.* at 1544.[1] In remanding the case, the Court reiterated the well-settled test for Article III standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–560 (1992), and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000): "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1548. The Court's analysis then focused on the first element of this three-part test—the requirement of an injury in fact. *Id.* at 1549.

In reiterating the three-part analysis for Article III standing under *Lujan* and *Friends of the Earth*, the Court chose not to pave new ground; rather, it reiterated that so long as a claimed

[1] Internal citations and quotations are omitted, and emphasis is added, unless otherwise noted.

injury is concrete and particularized, a plaintiff satisfies the injury in fact requirement for Article III standing. *Spokeo*, 136 S. Ct. at 1548. In the end, the Court found that because the Ninth Circuit did not "fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete." *Id.* at 1549. The Court then remanded the case so the lower court could perform the analysis required by *Lujan* and related decisions. In so doing, the Court noted: "We take no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct." *Id.*

B. An intangible harm can constitute injury in fact, thus conferring Article III standing.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* 1548. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. And for an injury to be "concrete," it must be '*de facto*'; that is, it must actually exist." *Id*. But as the Court stated:

> "Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. *See, e.g., Pleasant Grove City v. Summum,* 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (free exercise).
>
> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 775–777, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." 504 U.S., at 578, 112 S.Ct. 2130. Similarly, Justice

> Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.*, at 580, 112 S.Ct. 2130 (opinion concurring in part and concurring in judgment).

Id. at 1549.

While the Court noted that "a bare procedural violation, divorced from any concrete harm," would not "satisfy the injury-in-fact requirement of Article III," the Court reaffirmed that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. . . ." *Id*. at 1549; *accord Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. . . .") (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). That is, the Court explained that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."

Justice Thomas's concurrence explains further that when Congress creates new private rights—such as the rights afforded by the FDCPA (*i.e.*, the right to receive specific disclosures from a debt collector regarding the protections afforded by federal law)—Article III standing exists once those private rights are invaded:

> When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts' power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137–138, 59 S.Ct. 366, 83 L.Ed. 543 (1939) (recognizing that standing can exist where "the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege").

Spokeo, 136 S. Ct. at 1551 (Thomas, J., concurring).

C. Mr. Abercrombie suffered an injury in fact.

1. Congress mandated that debt collectors use specific language in initial debt collection letters so that consumers are made aware of their rights, and to protect consumers from abusive, deceptive and unfair debt collection practices.

Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors," 15 U.S.C. § 1692(e), and in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which Congress found to have contributed "to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). As the Consumer Financial Protection Bureau ("CFPB")—the federal agency tasked with enforcing the FDCPA—explained, "[h]armful debt collection practices remain a significant concern today. In fact, the CFPB receives more consumer complaints about debt collection practices than about any other issue."[2]

To combat this serious problem, the FDCPA requires debt collectors to send consumers "validation notices" containing certain information about their alleged debts and consumers' rights. 15 U.S.C. § 1692g(a). A debt collector must send this notice "[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt," unless the required information was "contained in the initial communication or the consumer has paid the debt." *Id.*, § 1692g(a). As noted by the CFPB and the Federal Trade Commission, "this validation requirement was a 'significant feature' of the law that aimed to 'eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'" *Hernandez*, No. 14-15672, at 5 (quoting S. Rep. No. 95-

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[2] *See* Brief for the CFPB as Amicus Curiae, Dkt. No. 14, p. 2, Hernandez v. Williams, Zinman, & Parham, P.C., No. 14-15672 (9th Cir. Aug. 20, 2014), http://www.ftc.gov/system/files/documents/amicus_briefs/hernandez-v.williams-zinman-parham-p.c./140821briefhernandez1.pdf.

382, at 4 (1977)).

Among other things, the validation notice required by the FDCPA must advise the consumer that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid *by the debt collector*. 15 U.S.C. § 1692g(a)(3) (emphasis added). Importantly, without the qualifying prepositional phrase "by the debt collector," the passive statement that a debt "will be assumed to be valid" does not convey who is entitled to assume the debt to be valid, in violation of a debt collector's obligation under the statute to inform the consumer that it is only the debt collector who will assume the debt to be valid. *Fariasantos v. Rosenberg & Associates, LLC*, 2 F. Supp. 3d 813, 823 (E.D. Va. 2014) ("The Letter's failure to state who will assume the validity of the debt does not fulfill Rosenberg's clear obligation under the statute to tell the consumer that it is the debt collector who will assume the debt to be valid."); *Guerrero v. Absolute Collection Serv., Inc.*, No. 1:11–cv–02427–JEC–RGV, 2011 WL 8183860, at *4 (N.D. Ga. Oct. 6, 2011) ("Moreover, ACS's failure to limit its statement that any undisputed debt would be assumed valid to the debt collector violates the notice requirements of § 1692g(a)(3) by making the least sophisticated consumer uncertain as to her rights.").[3]

Moreover, a consumer can dispute the debt orally, or in writing, within thirty days of receipt of the initial debt collection communication from the debt collector. Thus, a validation notice that advises the consumer that she must dispute the debt, in writing, to prevent a debt collector from assuming the debt to be valid likewise violates the FDCPA because it would confuse consumers into thinking that they do not have rights that they are entitled to under federal law. *See Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005) ("The plain language of subsection (a)(3) indicates that disputes need not be made in writing, and the plain meaning is neither absurd in its results nor contrary to legislative intent. Thus, there is no writing requirement implicit in § 1692g(a)(3). Bridgeport Financial's collection notice violated § 1692g insofar as it stated that disputes must be made in writing.); *Baez v. Wagner & Hunt, P.A.*, 442 F. Supp. 2d 1273, 1277 (S.D. Fla. 2006) ("By including the phrase "in writing" in its letter to Baez, Wagner violated the plain meaning of the statute.").

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[3] *See also Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A.*, No. 11–80894, 2011 WL 4499100, at *3 (S.D. Fla. Sept. 27, 2011) (collecting cases); *Galuska v. Collectors Training Inst. of Ill., Inc.*, No. 3:07–cv–2044, 2008 WL 2050809, at *5 (M.D. Pa. May 13, 2008) (holding that failure to include "by the debt collector" or words such as "we" or "this office" in the required disclosure would lead least sophisticated debtor to believe the debt would be assumed valid by some other entity); *Smith v. Hecker*, No. Civ. A. 04–5820, 2005 WL 894812, at *6 (E.D. Pa. Apr. 18, 2005) ("[O]mission of 'by the debt collector' would lead a least sophisticated debtor to believe that unless she disputes the validity of the debt ... her debt will be ... determined to be valid by a court, credit reporting agency, or other entity of authority [or] imposed upon her using a valid procedure....").

2. By sending a debt collection letter to Mr. Abercrombie that materially misstated his rights under the FDCPA and omitted material language required by the statute, Defendant caused Mr. Abercrombie to suffer the invasion of a legally protected interest.

On June 8, 2015, Defendant sent Mr. Abercrombie an initial written communication in connection with the collection of a consumer debt that failed to advise him that unless he, within thirty days after receipt of the letter, disputed the validity of the debt, or any portion thereof, the debt would be assumed to be valid by Defendant only—and not anyone else, such as a court or a credit bureau. *See* Dkt. No. 1 at ¶ 27. In addition, Defendant's June 8, 2016 letter advised Mr. Abercrombie that if he chose to dispute the debt, he "must notify this office in writing within thirty (30) days of the date you receive this letter." Dkt. No. 1-1. As set forth in his Complaint, these statements made by Defendant to Mr. Abercrombie contradicted and omitted material disclosures mandated by Congress. Dkt. No. 1 at ¶¶ 2-8.

Significant then, is that the FDCPA requires strict compliance with its validation notice requirements,[4] 15 U.S.C. §1692g, prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means" to collect a debt, *id.*, § 1692e, and authorizes a consumer to recover actual and statutory damages from "any debt collector who fails to comply with" that provision "with respect to" the consumer, *id.*, § 1692k(a). Together, these provisions grant consumers like Mr. Abercrombie a legally protected interest in not being subjected to misleading debt collection communications—an interest that Defendant invaded. In other words, Mr. Abercrombie suffered injury to his statutorily-created right to clear and accurate disclosures of his rights under the federal debt collection laws. *See* Declaration of Bennie R. Abercrombie, attached hereto as Exhibit A.

3. The invasion of the legally protected interest suffered by Mr. Abercrombie is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

The invasion of this legally protected interest is both particularized and concrete, and actual or imminent. The invasion of Mr. Abercrombie's rights was actual and particular to Mr. Abercrombie in that Defendant sent the misleading debt collection correspondence directly to him, and affected him "in a personal and individual way," *Spokeo*, 136 S. Ct. at 1548, because it misstated his rights regarding how to dispute the validity of his personal debt, and what the potential ramifications would be if he did not do so. As such, the injury that Mr. Abercrombie suffered is personal to him and is not a "nonjusticiable generalized grievance." *Id.* at 1548, n.7.

The misrepresentations that Defendant made to Mr. Abercrombie also constitute a "concrete" injury under *Spokeo* and past Supreme Court precedent. In *Spokeo*, the Court confirmed that informational injury—being denied access to information to which an individual is entitled by statute—that creates a risk of real harm, is a concrete injury under Article III. *See*

[4] *See Brailey v. F.H. Cann & Associates, Inc.*, No. CIV. 6:14-0754, 2014 WL 7639909, at *7 (W.D. La. Dec. 5, 2014) ("courts generally refer to the FDCPA as a 'strict-liability statute'").

136 S. Ct. at 1549–50. And, as the Court made clear, the denial of that information is on its own sufficiently concrete; "a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Id.* at 1549.

In support of this principle, the Court reaffirmed its past precedent, citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989), which held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was required by the Federal Advisory Committee Act. The inability to obtain such information, the Court explained, "constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449. Similarly, the Court referenced *Fed.l Election Comm'n v. Akins*, 524 U.S. 11 (1998), for a similar point, "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III." *Spokeo*, 136 S. Ct. at 1549–50 (citing *Akins*, 524 U.S. at 20–25).

And most notably in *Havens Realty Corp. v. Coleman*, the Supreme Court held that the deprivation of a right not to be "the object of a misrepresentation made unlawful under" the Fair Housing Act (FHA) satisfied Article III's "injury in fact" requirement. 455 U.S. 363, 373-74 (1982). In that case, a housing-discrimination "tester"—*i.e.*, a person who, "without an intent to rent or purchase a home or apartment, pose[d] as [a] renter[] or purchaser[] for the purpose of collecting evidence of unlawful steering practices"— brought suit against a realty company that had falsely informed her that no housing was available. *Id.* at 373-74. The FHA barred misrepresentations about available housing, thus creating a "legal right to truthful information about available housing." *Id.* at 373 (citing 42 U.S.C. § 3604(d)). The Court concluded that "the Art. III requirement of injury in fact is satisfied" because the tester "allege[d] injury to her statutorily created right to truthful housing information." *Id.* at 374; *see also Ctr. for Biological*

Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 429-31 (5th Cir. 2013) (organizational plaintiff sufficiently alleged a concrete informational injury that Emergency Planning and Community Right–to–Know Act was designed to redress, as required for standing).

The same is true here. As Congress found in enacting the FDCPA:

> There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy… Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

15 U.S.C. 1692(a)-(b).

So just as the statute in *Havens Realty* created a "legal right to truthful information about available housing," *Havens Realty*, 455 U.S. at 373, the FDCPA grants consumers a legal right to accurate disclosures about their rights when being sent an initial written communication from a debt collector. As set forth above, the express purpose behind these disclosure requirements is to protect consumers from the parade of horribles that caused Congress to enact the FDCPA in the first place.

But that does not mean that an FDCPA plaintiff must allege or prove that the misrepresentation had such consequential effects in his particular circumstances. Rather, the invasion a right not to be "the object of a misrepresentation made unlawful under [the statute]," suffices to support standing. *Havens Realty*, 455 U.S. at 373. And just like the invasion of rights to accurate information sufficed to support standing in *Public Citizen*, *Akin* and *Havens Realty*, so too does the invasion of the analogous right here support Mr. Abercrombie's standing to sue.

As *Spokeo* recognized, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure," *Spokeo*, 136 S. Ct. at 1549, and "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). As in *Havens Realty*, Defendant's deprivation of Mr. Abercrombie's statutory right not to be subject to misrepresentations in the context of debt collection is sufficiently concrete by itself to confer Article III standing on Mr. Abercrombie.[5]

There can be no doubt, therefore, that the abusive debt collection practices identified by Congress resulted here in real, concrete harm that Congress sought to redress by requiring debt collectors to accurately inform consumers of their rights. That is, Defendant's failure to comply with congressionally mandated disclosure requirements resulted in real harm to Mr. Abercrombie, who was deprived of important consumer protections. *See Nyberg v. Portfolio Recovery Associates, LLC*, Case No. 3:15-cv-01175-PK, 2016 WL 3176585, at *7 (D. Or. Jun. 2, 2016) ("Nyberg's claim that PRA attempted to collect a debt in violation of the FDCPA by filing Nyberg I sufficiently alleges that he suffered a concrete, particularized injury."); *In re Regions Bank ATM Fee Notice Litig.*, No. 10–12570, 2011 WL 4036691, at *4 (S.D. Miss. Sept. 12, 2011) ("Regardless of whether Plaintiffs were aware of the ATM fee, they were entitled to notice of the fee in the form prescribed by Congress and the Board. Congress created a statutory right to a particular form of notice, and Plaintiffs allege that Defendant did not provide it. That is a concrete, particular injury.").

Moreover, at the time that he received the letter, the violation of Mr. Abercrombie's statutory rights by Defendant created the risk of real harm as identified by Congress in enacting the FDCPA, *to wit*, that Mr. Abercrombie would be confused or misled as to his rights under federal law as the target of a debt collector. *See Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004) ("[W]e must assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors."). As a result, Mr. Abercrombie has Article III standing.

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[5] The statutory right to be free from misleading debt collection practices—part of the overarching "right to be treated in a reasonable and civil manner," *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997) ("A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner.")—is not a procedural right for which a separate "concrete harm" must be identified. Rather, as in *Havens Realty*, an infringement of that right is itself a "specific injury" that satisfies "the Art. III requirement of injury in fact." 455 U.S. at 374.

II. The proposed class as defined is sufficient for class certification and standing purposes.

A. Mr. Abercrombie's argument as to the relevance of receipt of standardized debt collection letters by members of the putative class was made in the context of class certification, not in response to a standing inquiry.

In its Order, Dkt. No. 34, this Court raised concerns with Mr. Abercormbie's argument in his reply brief that "a debt collector violates the FDCPA by sending a notice containing unlawful provisions—receipt of the notice by the intended recipient is irrelevant to liability." Dkt. No. 34 at 1-2. The Court's concern, in light of *Spokeo*, was that if a proposed class member did not receive a letter, "then it may prove difficult for them to establish that they were harmed by the procedural deficiencies in the letters." Dkt. No. 34 at 2.

Initially, it is important to note that Mr. Abercrombie's statement that receipt of the letters is irrelevant because a violation of the FDCPA occurs when a violative letter is mailed was made in the context of a class certification argument. Dkt. No. 34 at 2-4. In other words, the issue of Mr. Abercrombie's or the putative class members' standing was not raised at the time Mr. Abercrombie's reply was filed, and thus, Mr. Abercombie did not address standing in his reply brief.

Notably, in the Fifth Circuit, class certification is not precluded simply because a class may include persons who have not been injured by a defendant's conduct.[6] And the Fifth Circuit has made this clear on more than one occasion.

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[6] This is not to say that not all of the putative class members have been injured—they have. *See infra* II.C.

For example, in *Mims v. Stewart Title Guaranty Co.*, a group of mortgagors brought a putative class action against a title insurance company, alleging that they had been entitled to, but had not received, state law-mandated refinancing discounts for title insurance premiums, and asserting violations of the Real Estate Settlement Procedure Act as well as various state-law claims. 590 F.3d 298, 301 (5th Cir. 2009). On appeal of a grant of class certification from the district court, the Fifth Circuit, after finding that the named plaintiffs had standing, and accepting the Defendant's argument that the class included individuals with no loss at all, addressed the issue of whether the inclusion in a class of persons who have not been injured by a defendant's conduct precludes class certification:

> Stewart argues that this definition violates its right to due process and Rule 23 because, as the district court acknowledged, the legal requirements for eligibility for the R–8 credit are not identical to Stewart's Underwriting Guidelines and therefore the class as defined may include plaintiffs who are not in fact eligible for the discount. Because this class definition is based on Stewart's own criteria for allowing the R–8 discount, we find no abuse of discretion in defining the class this way. We agree with the district court that establishing prerequisites for class membership is sufficient evidence from which the jury could infer entitlement to the R–8 credit, which Stewart is free to rebut. *Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct. Kohen v. Pacific Investment Management Co., LLC*, 571 F.3d 672, 677 (7th Cir. 2009). In Kohen, the Seventh Circuit affirmed class certification in a case alleging that defendants cornered the market in a particular futures contract. The class included all persons who bought a futures contract on the Chicago Board of Trade in 10–year U.S. Treasury notes during a particular time period. *Id.* at 674. The court acknowledged that based on the individual characteristics of their trades during the time period, some purchasers may not have been harmed by the alleged manipulation, but concluded that the class as defined was sufficiently narrow as to exclude the likelihood that many plaintiffs were improperly included. *Id.* at 678. The district court was not required to determine that every class member had suffered damages as a prerequisite to class certification. *Id.* at 676.

Id. at 307 (emphasis added).

The Fifth Circuit reiterated this point in 2014, noting that "[a]s we stated in *Mims* in the context of the Rule 23 requirements, '[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'" *In re Deepwater Horizon*, 739 F.3d 790, 813 (5th Cir. 2014), cert. denied, —— U.S. ——, 135 S.Ct. 754, 190 L.Ed.2d 641 (2014) ("*Deepwater Horizon II*") (quoting *Mims*, 590 F.3d at 308). As well, having the opportunity to revisit the issue a year-and-a-half later, the Court held that it was bound by its reasoning in *Deepwater Horizon II* that "in the context of Rule 23 requirements, class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *In re Deepwater Horizon*, 785 F.3d 1003, 1006 (5th Cir. 2015) ("*Deepwater Horizon III*"). As a result, the law in the Fifth Circuit is settled: class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.

B. The Courts of Appeal take two distinct approaches in addressing standing at class certification.

In *Deepwater Horizon II*, the Fifth Circuit addressed the split of authority among the Courts of Appeals in addressing standing at the class certification stage:

> In attempting to answer [the question of how courts are to evaluate standing for the purposes of class certification], courts have followed two analytical approaches. According to one approach, which has been endorsed by three Justices concurring in *Lewis*, several circuits, and an influential treatise, the inquiry hinges exclusively on the Article III standing of the "named plaintiffs" or "class representatives." This test requires courts to ignore the absent class members entirely:
>
> > Unnamed plaintiffs need not make any individual showing of standing in order to obtain relief, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.
>
> In the years since *Lewis*, this approach to the standing inquiry during class certification has been followed by the Seventh, Ninth, and Third Circuits. Additionally, the Tenth Circuit has adopted this test at least in "class action[s]

> seeking prospective injunctive relief" and arguably also in class actions for damages as well. As stated in a frequently cited decision by the Seventh Circuit, *Kohen v. Pacific Investment Management Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009), it is "almost inevitable" that "a class will ... include persons who have not been injured by the defendant's conduct[ ] ... because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." According to *Kohen*, however, even this "inevitability" does not preclude Article III standing during the Rule 23 stage.
>
> Other circuit decisions have not necessarily ignored absent class members. According to these decisions, courts must ensure that absent class members possess Article III standing by examining the class definition. Importantly, however, this approach does not contemplate scrutinizing or weighing any evidence of absent class members' standing or lack of standing during the Rule 23 stage. The most frequently cited formulation of this test is found in the Second Circuit's decision in *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006): "We do not require that each member of a class submit evidence of personal standing. At the same time, no class may be certified that contains members lacking Article III standing. The class must therefore be defined in such a way that anyone within it would have standing." The Eighth Circuit has also applied this test, as have the Seventh and Ninth Circuits, despite both these latter circuits' statements in other decisions that absent class members are irrelevant to the Article III inquiry.

Deepwater Horizon II, 739 F.3d at 799.

The Fifth Circuit then opined that it was "unclear whether our circuit has already adopted the *Kohen* test in *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298 (5th Cir. 2009)," noting that "we stated in *Mims* that '[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'" *Id.* at 801. The Fifth Circuit pointed out that although the statement in *Mims* was made in the context of analyzing Rule 23 rather than Article III, "we elsewhere concluded in *Mims* that '[t]here is no serious question that the plaintiffs have standing' after explicitly analyzing only 'the named plaintiffs.'" *Id.*

C. Under either of the *Kohen* or the *Denney* approaches, Mr. Abercrombie's class definition is sufficient as all members of the class have Article III standing.

Mr. Abercrombie seeks to certify a class of all persons with a Louisiana address to whom

Rogers, Carter & Payne, LLC mailed an initial debt collection communication that stated: "If you do not dispute the debt within that thirty (30) day period, it will be assumed to be valid," and/or, "If you choose to dispute the debt, or any portion thereof, or if you choose to request the name of the original creditor, you must notify this office in writing within thirty (30) days of the date you receive this letter," between August 19, 2014 and August 19, 2015, in connection with the collection of a consumer debt, *and where the initial debt collection communication was not returned to Rogers, Carter & Payne, LLC as undeliverable*. *See* Dkt. No. 29 at 1. Notably, Defendant admitted through discovery that it mailed 2,542 such letters to persons in Louisiana between August 19, 2014 and August 19, 2015. *See* Dkt. No. 29-2 at 4-5.

Relevant here then, under the common law Mailbox Rule, "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992); *see also Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985) (properly mailed computer-generated notices can be presumed received); *Universal Serv. Admin. Co. v. PT–1 Commc'ns, Inc.*, 437 B.R. 766, 774 (E.D.N.Y. 2010) ("[p]roof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.") (quoting *Hagner v. United States*, 285 U.S. 427, 430 (1932)).

The Mailbox Rule has been applied by numerous courts in the context of the FDCPA. *See, e.g.*, *Mahon v. Credit of Placer County Inc.*, 171 F.3d 1197, 1201-02 (9th Cir. 1999); *Schneider v. Cont'l Serv. Grp.*, No. 13–CV–5034, 2013 WL 6579609, *5-6 (E.D.N.Y. Dec. 16, 2013); *Krawczyk v. Centurion Capital Corp.*, No. 06–C–6273, 2009 WL 395458, *13 (N.D. Ill. Feb. 18, 2009); *Campbell v. Credit Bureau Sys., Inc.*, Civil Action No. 08–CV–177–KSF, 2009

WL 211046, * 11-13 (E.D. Ky. Jan. 27, 2009).[7] The Mailbox Rule has also been adopted by the Fifth Circuit. *Duron v. Albertson's LLC*, 560 F.3d 288, 290 (5th Cir. 2009) ("As stated by the Supreme Court, "[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.").[8]

As such, there is no dispute that each member of the proposed class as defined, including Mr. Abercrombie, received the allegedly violative letter from Defendant. As a result, and for the reasons more fully discussed above concerning Mr. Abercrombie's standing, *supra* Section I.C., the proposed class is defined in such a way that each member has Article III standing. Thus, under either the *Kohen* formulation of standing—requiring only the named plaintiff to have Article III standing—or under the *Denney* formulation of standing—requiring the class to be defined in such a way that anyone within it would have standing— the class is sufficiently defined.

D. Even if members of the class did not receive the letter at issue, they still have standing.

Even assuming that some members of the proposed class did not receive the letter at issue, such a fact would not undermine those persons' standing. Defendant has admitted that it sent what Mr. Abercormbie alleges to be materially misleading disclosures to each member of the proposed class. Said action—assuming the Court finds the disclosures to be misleading—violates the FDCPA as to each class member regardless of whether the class member read or even received the disclosures. *See Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir. 1997) ("If reading were an element of the violation, then Bartlett would have to prove that he read the letter. But it is not. The statute, so far as material to this case, requires only that the debt collector 'send the consumer a written notice containing' the required information. § 1692g(a)."); *Mattson v. U.S. W. Commc'ns*, 967 F.2d 259, 261 (8th Cir. 1992) ("Once SIC placed the letters in the mail, its conduct with respect to any violation of the FDCPA was complete. The date on which SIC mailed the letters was its last opportunity to comply with the FDCPA, and the mailing of the letters, therefore, triggered section 1692k(d).").[9] As the Southern District of California opined in an analogous situation:

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[7] *See, e,g., Moore v. Blatt, Hasenmiller, Leibsker, and Moore, LLC*, No. 05-3282, 2006 WL 1806195, *9-10 (C.D. Ill. June 29, 2006); *Johnson v. Midland Credit Mgmt. Inc.*, No. 1:05 CV 1094, 2006 WL 2473004, at *12 (N.D. Ohio Aug. 24, 2006); *Zamos v. Asset Acceptance, LLC*, 423 F. Supp. 2d 777, 785-787 (N.D. Ohio 2006); *Van Westrienen v. Amercontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1097-98 (D. Or. 2000).

[8] Of course, there are other ways to establish that class members received a copy of the violative letter. For instance, during the claims administration process, each class member can submit a short affidavit attesting to his or her receipt of the letter. *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417-18 (N.D. Ill. 2012); *see also* Conte & Newberg, Newberg on Class Actions § 10:12, at 508 (4th ed. 2002) ("Methods of claim verification may also vary with the ease of documenting claims by individual members, and also with the size of the claims involved. A simple statement or affidavit may be sufficient where claims are small or are not readily amenable to verification.").

> Another reason was ably articulated by the court in *In re Google AdWords*. As the court explained in that case, "[t]he requirements of Article III turn on the nature of the claim that is asserted," and in California relief under the UCL and FAL is available without individualized proof of deception, reliance, and injury. *In re Google AdWords*, 2012 WL 28068 at *10. This is because the UCL is focused "on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *In re Tobacco II Cases*, 46 Cal.4th at 312, 93 Cal.Rptr.3d 559, 207 P.3d 20. *See also Stearns*, 655 F.3d at 1021 ("That law, as already noted, keys on the wrongdoing of Appellees and is designed to protect the public (including the proposed class members).") That being the law of the substantive claims at issue in this case, it makes little sense to concoct and impose a standard for Article III standing that effectively contains the very reliance and deception requirements the actual claims do not. That is basically what HP is asking the Court to do here. Even though there's no reliance or deception element to a UCL claim under California law, it wants the Court to impose one under Article III as a matter of federal constitutional law in order to find that the absent class members have standing. It wants the Court to impose a requirement for bringing a claim

[9] *See also Janetos v. Fulton Friedman & Gullace, LLP*, No. 15-1859, 2016 WL 1382174, at *6 (7th Cir. Apr. 7, 2016) (finding that there was no need for individual inquiry about the materiality of a violation of 15 U.S.C. § 1692g to any given recipient as Congress had decided that the failure to make the disclosure is a failure the FDCPA is meant to penalize).

> that isn't required for actually having a claim in the first place. The Court won't do that.

Waller v. Hewlett–Packard Co., 295 F.R.D. 472, 481 (S.D. Cal. 2013).

Similarly here, to protect the public from unscrupulous debt collection practices, the FDCPA is focused on the debt collector's actions, not the consumer's response to them. *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-1392, 2011 WL 3176453, at *4 (S.D. Cal. July 26, 2011) ("Clearly, the FDCPA's focus is on a debt collector's conduct, and not on whether a consumer suffers actual damages or is misled. . . . Thus, if a consumer's claim is based on misstatements or mischaracterizations in a letter from a debt collector, whether the consumer received the letter is irrelevant."). As such, it would make little sense to impose a standard for Article III standing that effectively contains a requirement that members of the class had to have received and/or relied upon the misleading disclosures when they do not have to establish either of those facts to succeed on their underlying claims. This is especially true here, where Defendant's actions in mailing form debt collection letters that contained materially misleading disclosures to thousands of Louisiana consumers created the "risk of real harm" that the FDCPA was enacted to prevent. *See, supra,* I.C.1.; *see also Spokeo*, 136 S.Ct. at 1549 ("Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.").

Conclusion

The Supreme Court's decision in *Spokeo* reiterated long-standing principles of Article III standing. And since Mr. Abercrombie and the proposed class meet the requirements for Article III standing, there is no question concerning this Court's jurisdiction over this matter. *See*

Chapman v. Bowman, Heintz, Boscia, & Vician, P.C., Case No. 2:15-CV-120 JDA, 2016 WL 3247872, at *1, n.1 (N.D. Ind. Jun. 13, 2016) ("Because *Spokeo* largely reiterated long-standing principles of Article III standing, and did not clearly disrupt appellate precedent holding that plaintiffs in Ms. Chapman's position have standing to bring this type of claim under the FDCPA, the Court agrees that Ms. Chapman has standing to assert this claim."). As a result, Mr. Abercrombie respectfully requests that this Court grant his motion for class certification. Dkt. No. 29.

Dated: June 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed on June 15, 2016, via the Court Clerk's CM/ECF system, which will provide notice to the following counsel of record:

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